

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN F. WHITEMAN,	§
	§ No. 422, 2009
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID Nos. 30604628DI
	§ 30901716DI
Plaintiff Below-	§
Appellee.	§

Submitted: September 8, 2009
Decided: September 28, 2009

Before **HOLLAND, BERGER** and **JACOBS**, Justices

ORDER

This 28th day of September 2009, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Benjamin F. Whiteman, filed an appeal from the Superior Court's July 16, 2009 order denying his motion for sentence modification pursuant to Superior Court Criminal Rule 35. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) In 1987, Whiteman pleaded guilty to Burglary in the Second Degree. The Superior Court signed the order declaring Whiteman to be a habitual offender in accordance with Del. Code Ann. tit. 11, §4214(a), but did not sentence him as a habitual offender. Rather, the Superior Court, in its discretion, sentenced Whiteman to 10 years of Level V incarceration, to be suspended after 3 years for 7 years of decreasing levels of supervision. In 1989, Whiteman was found guilty by a Superior Court jury of Unlawful Sexual Penetration in the Third Degree. He was sentenced to life imprisonment as a habitual offender.² Whiteman's conviction was affirmed by this Court on direct appeal.³ Since that time, Whiteman has filed numerous motions attacking his 1987 and 1989 convictions and sentences.

(3) In this appeal, Whiteman claims that he was improperly sentenced as a habitual offender in 1989 based upon the 1987 order. In 2001, on appeal from the Superior Court's denial of Whiteman's motion for sentence modification, this Court held that: "Whiteman's claim that he was sentenced improperly as a habitual offender in 1989 is without merit. We

¹ Supr. Ct. R. 25(a).

² Del. Code Ann. tit. 11, §4214(a).

³ *Whiteman v. State*, Del. Supr., No. 455, 1989, Walsh, J. (Jan. 11, 1991).

have reviewed the record, which includes the original 1987 documents [A]t the sentencing hearing following Whiteman's 1989 conviction, the Superior Court properly relied on its previous 1987 order when it sentenced Whiteman to life imprisonment as a habitual offender."⁴ Because this Court's prior decision regarding Whiteman's 1989 sentencing constitutes the "law of the case," Whiteman is foreclosed in this proceeding from asserting a claim based upon that issue.⁵

(4) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State of Delaware's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁴ *Whiteman v. State*, Del. Supr., No. 40, 2001, Steele, J. (Oct. 23, 2001).

⁵ *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998).